APPEAL NO. 010563

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 28, 2001. The hearing officer found that the respondent (claimant) injured her neck on _____, in the course and scope of employment, and had disability from October 26 to the date of the CCH.

The appellant (carrier) appeals the hearing officer's decision as being against the great weight and preponderance of the evidence. The claimant responds that the decision is supported by the record and should be affirmed.

DECISION

We affirm the hearing officer's decision.

The hearing officer did not err by determining that the claimant was injured and had disability for the time period in issue. Much of the CCH was devoted to the timing of the claimant's report of her injury, as it was the carrier's contention that this was a post-firing spite claim. The claimant indicated that she was never counseled and was surprised entirely by her termination. Witnesses from the employer asserted that the claimant was advised several times about tardiness or failures to meet expectations (one purported deficiency was that the claimant answered the telephone with the employer's name, without saying hello first); however, the parties appeared to agree that if there was counseling, it was not formal, written, or in the context of any progressive discipline.

Her supervisor, Ms. G, said that she did not recall witnessing the claimant's accident, which involved the claimant twisting her neck to look up at Ms. G while bending down to pick up a piece of paper, but that she did recall that later that afternoon the claimant had an ice pack on her neck. Ms. G said that she did not ask the claimant why she had the ice pack on her neck and the claimant did not offer any explanation, an answer similar to that given by manager Mr. H. Supervisor Mr. HS said that when the claimant did not show up on October 26 and he could not find a part order, he instructed Ms. G to fire the claimant. The claimant was terminated after she called from home on October 26 to say that she could not come to work because of neck pain; the claimant said that while she formally reported her claim the next day, "everyone knew" at the company that she hurt her neck on the _____. Medical records document a cervical strain.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This

is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). When termination and report of injury occur at roughly the same time, it is up to the finder of fact to determine if the report of injury was motivated by any personnel action in assessing credibility. The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer evidently chose to believe the claimant's version of the facts and is supported by this record in his evaluation. An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Judge